

TABLE OF CONTENTS

• WHAT IS ANTI COMPETITIVE BEHAVIOUR?

IN OTHER NEWS

CONTINUED FROM MAIN COLUMN

How do actions affect our industry?

The Federation is of the opinion that no legislation should be used in a manner which does not benefit all.

Here are a few scenarios for you to ponder on:

- A qualification is split in two to prevent people going into competition with their employer and others upon completing their apprenticeship.
- A two tier qualification is maintained because it's claimed experience under the supervision of another person is required to afford protection to the public, however around 2,500 exemptions to unregistered people are issued annually by the Board.
- People who commit the time and expense in doing an apprenticeship qualify, but are not deemed workplace competent, and yet exemptions are issued by the Board giving non registered or unqualified individuals more benefits than a tradesman qualified person.
- The Board using regulations and

WHAT IS ANTI COMPETITIVE BEHAVIOUR?



**COMMERCE
COMMISSION**
NEW ZEALAND
Te Komihana Tauhokohoko

You have heard us talk over recent months about the regulation of our industry seeming to support anti

competitive behaviour. A few people have asked - "What is anti competitive behaviour?"

This is what the Commerce Commission has to say about anti competitive behaviour:

Anyone who runs a business in New Zealand must comply with the Commerce Act, which aims to promote competition in markets for the long-term benefit of consumers.

Competitive markets help to keep prices down and ensure that the quality of goods and services remains high. Competition also ensures consumers have a range of choices, and firms have incentives to innovate, invest and operate efficiently. Anti-competitive behaviour can jeopardise all of this, as well as a company's ability to win new customers.

It is important that businesses are aware of what they can and cannot do when talking to their competitors. The Commerce Act prohibits anti-competitive agreements between firms such as agreements to fix prices, allocate markets or restrict output.

In addition, it is important for purchasers, such as procurers, to be aware of the rules around anti-competitive conduct so they can help detect illegal behaviour, such as bid rigging. This type of anti-competitive conduct prevents open and effective competition and means procurers are unlikely to achieve best value for money for their business, customers, and in some cases, taxpayers.

The Commission can take enforcement action against businesses and individuals who breach the Commerce Act and the court can impose significant penalties for breaches against both businesses and individuals.

Applying market power can be a risk so here is what the Commerce Commission has to say about market power:

Some businesses have substantial market power. This in itself is not illegal. However, under the Commerce Act it is illegal for a business with

legislation to provide favouritism to some industry organisations, divides and provides benefits to only selected sectors of the industry at a cost to all the industry.

- The issuing of exemptions puts exemption holders and their employers at a financial advantage over registered practitioners who have to pay to police the exemption holders.

- Preventing training providers from providing lengthy pre-trade training and limiting what can be taught, and then planning to implement a pre-trade by a different name is questionable.

A frightening issue is that Section 32 of the Plumbers Gasfitters and Drainlayers Act 2006 was instilled in the Act to protect the practitioners as the legislators felt the legislation gave the Board too much power.

Section 32 states:

Principles guiding prescribing of registration and licensing matters

In prescribing matters under sections 28 and 30, the Board must be guided by the following principles:

(a) the matters must be necessary to—

(i) protect the health or safety of members of the public; or

(ii) promote the prevention of damage to property; or

(iii) promote the competency of persons who do, or assist in doing, sanitary plumbing, gasfitting, or drainlaying; or

(iv) carry out, give effect to, or provide for a matter that is incidental to, or consequential on, the matters relating to subparagraph (i), (ii), or (iii); and

a substantial degree of market power to take advantage of that power for an anti-competitive purpose.

A business with market power can take advantage of its market dominance to drive a competitor out of business or to prevent new competitors from starting up. This can reduce or eliminate competition from a market, harming consumers and the wider economy by increasing prices, and reducing choice and quality.

There are many types of behaviour that are illegal under section 36 of the Commerce Act. It is often hard to distinguish anti-competitive behaviour from aggressive, but legal, competitive behaviour that benefits consumers. For example, cutting prices to win customers is usually a sign of competition, but in some circumstances can harm competition.

Likewise, aggressive rivalry by large businesses may not be illegal as large businesses also have a right to compete. However, they are not allowed to take advantage of their market power to prevent others from competing effectively.

Charging high prices to consumers is not illegal under section 36 of the Commerce Act.

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What is substantial market power? A business has substantial market power when its actions are not constrained by competition. For example, a business with substantial market power can profitably hold prices above competitive levels for a sustained period of time. Such a price rise will only be profitable if the business does not face effective competition from rivals or entrants in the same market.

When assessing whether a business has substantial market power, we consider how much existing and potential competition the business faces. We also look at other factors such as how much power buyers have.

It was mentioned above about anti competitive purpose so what does "anti-competitive purpose" mean?

Behaviour is illegal under section 36 if it has one of the following anti-competitive purposes:

- *to restrict the entry of another business into any market*
- *to prevent or deter a business from being able to compete effectively*
- *to eliminate a business from any market.*

Even if a business has other legitimate reasons for certain behaviour, if it also has one of these anti-competitive purposes, the behaviour will breach section 36.

(b) the matters may not unnecessarily restrict the registration or licensing of persons as plumbers, gasfitters, or drainlayers; and

(c) the matters may not impose undue costs on plumbers, gasfitters, or drainlayers, or on the public.

When applying Section 32 to registration and licensing the Federation believes the Board is failing to protect the public and practitioners.

The legislation and regulations are being applied in such a manner that the principles of Section 32 aren't being met.

A lot of the terms used are open to interpretation and obviously the Board will use them to support whatever behaviour they want.

For example - what is an undue cost? The Board and government give the impression that cost doesn't matter when it comes to human life, injury or damage to property but ask any person who is paying (taxed) to police the industry when no one else makes any contribution and you may be shocked by some of the answers.

Where Section 32 states the matters may not unnecessarily restrict the registration or licensing of persons is highly debatable we would have to ask what does the dual qualification of Tradesman and Certifier do?

We believe it unnecessarily restricts a person obtaining a qualification where they aren't required to be supervised.

When we look at apprentice training, legislation protects the Skills Organisation in their capacity as the Industry Training Organisation. They can do whatever they want supported by the Board and others (a cartel?)

However, section 36 does not protect individual businesses from facing vigorous, or even aggressive, competition.

Cartels can also affect competition. This is what the Commerce Commission has to say about cartels:

Cartels deprive consumers and other businesses of a fair deal. A cartel is where two or more businesses agree not to compete with each other in order to make greater profits. This conduct can take many forms, including price fixing, dividing up markets, rigging bids or restricting output of goods and services.

Cartel conduct can result in higher prices and a reduction of choice and quality. Under the Commerce Act, businesses and individuals can face large financial penalties if they have been part of a cartel and individuals can be banned from running a company.

Trade organisations also need to be aware of behaviour which could put members at risk. Here is a piece from the Commerce Commission.

Belonging to a trade association can bring many benefits for members. Trade associations play a useful role in enabling businesses to meet and discuss industry wide issues and practices and to share knowledge and technical information.

However, members of trade or industry associations are usually competitors and trade associations can therefore create the environment for discussions and facilitation of cartels.

Price fixing occurs when competitors agree to directly or indirectly fix prices for goods or services. This means that care must be taken to ensure that associations and individual members do not engage in anti-competitive behaviour that may breach the Commerce Act when taking part in association activities.

An individual member of a trade association can be held liable if the trade association to which he or she belongs acts in an anti-competitive way, even if this has occurred without the individual's knowledge or involvement. For this reason, all businesses and trade associations should familiarise themselves with the relevant provisions of the Commerce Act, and take steps to ensure they are not at risk of breaching the Act.

The purpose of the Act is to promote competition in markets for the long term benefit of New Zealanders. Breaches of the Commerce Act may result in penalties being imposed by the courts on businesses, associations and individuals.

The Commerce Commission is responsible for investigating alleged breaches of the Commerce Act. This fact sheet explains some key sections of the Commerce Act for businesses and trade associations and suggests some practical tips to reduce the risks of breaching the Act.

What is unlawful? There are a number of provisions of the Commerce Act of which businesses, trade associations and members of trade associations should be aware:

The Skills Organisation has no competition and there is no accountability. They can use the legislation to do what they want when they want and the industry can't do anything about it.

As you can see anti competitive behaviour or actions that support anti competitive behaviour has a huge impact on the wellbeing of the industry.

It affects productivity, skill levels, industry numbers and the trust practitioners have in the regulation of the industry.

Public image is one thing but the perception and trust the industry has in the Board is another issue which must be addressed as anti competitive behaviour or similar is having a devastating effect on the industry.

As an industry we can voice our opinions about anti competitive behaviour and poor regulatory governance or we can wait until the behaviours are so blatant that they warrant complaints or legal action.

→ Section 27, which makes anti-competitive agreements unlawful. It prohibits anyone from entering into contracts, arrangements or understandings (agreements) if those agreements have the purpose, or effect or likely effect of substantially lessening competition in a market.

→ Section 30, which makes agreements between competitors containing a cartel provision unlawful (cartel provisions are those that have the purpose, effect or likely effect of price fixing, restricting output or market allocating). These practices are also sometimes called restrictive trade practices.

While there are other provisions in the Commerce Act, this fact sheet focuses on those provisions most likely to be relevant to businesses, trade associations and members of trade associations. The Commerce Act Trade associations 2/8 FACT SHEET JULY 2018 Special provisions for trade associations Agreements made by associations

– section 2(8) (a) The Commerce Act recognises that trade associations can become a vehicle for anticompetitive behaviour, such as the restrictive trade practices mentioned above. Under Section 2(8) (a) of the Act any agreement entered into by a trade association is considered to be entered into by all the association's members.

In other words, this section deems all the members of an association to be parties to any agreement made by that association, regardless of an individual member's involvement or knowledge of the agreement, unless one of the following two situations apply:

→ Section 2(9)(a) states that a member will not be seen as party to an agreement made by the association if the member expressly notifies the association in writing that he or she wishes to disassociate themselves from the agreement, and who then takes steps to disassociate him or herself.

→ Section 2(9)(b) states that if a member can establish that he or she had no knowledge, and could not reasonably have been expected to have any knowledge of the agreement, he or she will not be deemed to be a party to the agreement.

The issues outlined in the article above are mostly applicable to businesses and trade organisations, however some behaviour the Federation observes gives the perception that the legislation used to regulate the plumbing, gasfitting and drainlaying industry is being used to support some in the industry and to subdue others. Fairness is vitally important in the regulation of any industry.

Continued in the side column

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